

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMOS GARETT NICKLES,

Defendant-Appellant.

UNPUBLISHED

June 8, 2006

Nos. 258850/263448

Branch Circuit Court

LC No. 03-067853-FH

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of one count of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b), and two counts of second-degree CSC, MCL 750.520c(1)(a). Defendant also challenges his three concurrent sentences of 84 months' to 15 years' imprisonment. We affirm defendant's convictions but remand this case to the trial court for resentencing.

Defendant's convictions arose from allegations of sexual abuse made by two of his former stepdaughters. Defendant's conviction for third-degree CSC arose from allegations that he forced or coerced his older stepdaughter to engage in fellatio in June 1998, when she was eighteen. At trial, defendant's older stepdaughter testified about several instances of previous sexual abuse by defendant. Defendant's convictions for second-degree CSC arose from two instances in which defendant touched his younger stepdaughter when she was under the age of thirteen. At trial, defendant's younger stepdaughter testified about several instances in which defendant exposed himself to her.

Defendant first argues that the trial court abused its discretion by admitting evidence of prior sexual conduct between defendant and his older stepdaughter under MRE 404(b). We disagree. This Court only reverses a trial court's decision to admit evidence of prior bad acts under MRE 404(b) if there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). This Court finds an abuse of discretion "only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Evidence of prior bad acts is admissible as long as it is probative of some fact other than the defendant's criminal propensity. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656

(1990). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), our Supreme Court succinctly described the four-part test it had adopted in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), to determine if prior bad acts evidence is admissible under MRE 404(b):

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [Internal citations and quotation marks omitted.]

The trial court allowed the prosecution to present evidence of prior sexual conduct between defendant and his older stepdaughter to establish that defendant acted with coercion or force when engaging in fellatio with her in June 1998, in violation of MCL 750.520d(1)(b). Defendant specifically argues that this evidence did not satisfy the third step of the *VanderVliet* test. We find, however, that the danger of undue prejudice did not substantially outweigh the probative value of this evidence. It helped to demonstrate that defendant forced or coerced his older stepdaughter to engage in fellatio with him in June 1998.

Our Supreme Court has noted, “[I]t has been held that the probative value outweighs the disadvantage where the crime charged is a sexual offense and other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense.” *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). The Court further explained:

“[W]here a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; *such* previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction.” [Id. at 414, quoting *People v Jenness*, 5 Mich 315, 323 (1858) (emphasis in *Jenness*).]

The testimony given by defendant’s older stepdaughter about her sexual interaction with defendant in June 1998 merely consists of her testimony that she said “no” to defendant’s request for fellatio, he put his arm around her head and told her to perform the act if she loved him, and she assented out of a fear of being hit. Based on this testimony alone, the jury could not properly evaluate her assertion that she performed fellatio because she feared defendant would hit her. The evidence of defendant’s prior sexual acts with his older stepdaughter, which began when she was only eight years old and which she never refused to perform, as well as defendant’s history of hitting her for disobedience, would help a reasonable juror conclude that defendant’s older

stepdaughter reasonably feared being hit for refusing to engage in fellatio with defendant in June 1998. Defendant's history of demanding sexual favors from his older stepdaughter when she was a child would help a reasonable juror to conclude that she was coerced to engage in fellatio when defendant placed his arm around her head and stated that she would perform fellatio if she loved him.

Furthermore, as required under the *VanderVliet* test, the trial court instructed the jury to only use the testimony of defendant's older stepdaughter to establish if she was susceptible to force or coercion. "A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence." *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). A jury is presumed to follow the instructions given to it. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the older stepdaughter's testimony detailing defendant's uncharged sexual misconduct toward her passes all four prongs of the *VanderVliet* test, the trial court properly admitted this testimony under MRE 404(b).

Next, defendant claims that he was denied effective assistance of counsel, because his trial counsel did not object when the trial court failed to instruct the jury that it could not use the testimony given by defendant's older stepdaughter regarding defendant's uncharged sexual misconduct with her when considering the credibility of the testimony of defendant's younger stepdaughter, and vice versa. We disagree.

Because defendant failed to move for a new trial or an evidentiary hearing regarding his claim of ineffective assistance of counsel, this Court's review of defendant's claim is limited to facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Factual findings are reviewed for clear error, although constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

First, we note that the trial court instructed the jury only to use the testimony of defendant's older stepdaughter regarding defendant's uncharged acts of sexual misconduct against her to determine if she was susceptible to force or coercion when she performed fellatio on defendant in June 1998. Immediately before she testified about defendant's alleged sexual abuse of her as a child, the trial court stated:

To the extent that any information you are about to hear might serve as background, that is only to establish whether or not this witness may have been susceptible to any force or coercion. That stands, as you heard, as one of the elements in each of those two counts. You are not to use it to judge whether or not any other acts did, in fact, occur.

Juries are presumed to follow their instructions. *Graves, supra* at 486. Therefore, we conclude that the jury only considered the testimony of defendant's older stepdaughter for the purpose of evaluating whether she was susceptible to force or coercion and did not consider her testimony when determining the credibility of the testimony of defendant's younger stepdaughter.

Because the trial court properly instructed the jury only to use the testimony of defendant's older stepdaughter to establish the element of force or coercion in the third-degree CSC charge, any instruction telling the jury not to consider her testimony when determining the credibility of the testimony of defendant's younger stepdaughter would have been redundant. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Therefore, defense counsel was not ineffective for failing to object to the trial court's proper instructions to the jury.

The trial court did not give the jury a similar limiting instruction before defendant's younger stepdaughter testified. Regardless, defendant has failed to establish that his trial counsel's failure to object to the lack of such a limiting instruction constituted ineffective assistance of counsel. "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *Riley, supra* at 140. To establish that counsel's deficient performance prejudiced the defense, defendant must establish that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This means that defendant "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Regardless of whether defendant's trial counsel was unreasonable for failing to object to this lack of a limiting instruction, we conclude that defendant has simply failed to meet his appellate burden of demonstrating that his counsel's failure to make such an objection denied him a fair trial or that the results of the proceeding would have been different if such an objection had been made. Accordingly, reversal is not warranted.

Defendant also claims that his conviction for third-degree CSC should be reversed due to insufficient evidence establishing that he forced or coerced his older stepdaughter to engage in fellatio with him. We disagree. This Court reviews claims of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, "it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence, and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant was convicted of third-degree CSC under MCL 750.520d(1)(b), which states:

A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

* * *

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

Furthermore, “[f]orce or coercion is not limited to physical violence but is instead determined in light of all the circumstances.” *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). Force or coercion is established when the facts of the case indicate defendant’s actions were “sufficient to create a reasonable fear of dangerous consequences” *People v McGill*, 131 Mich App 465, 472; 346 NW2d 572 (1984) (internal citation and quotation marks omitted). Our Supreme Court has explained the “force” necessary to satisfy the requirements of MCL 750.520d(1)(b):

To be sure, the “force” contemplated in MCL 750.520d(1)(b) does not mean “force” as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite “force” for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited “force” encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes. [*People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002).]

These explanations indicate that the element of “force or coercion” is established upon a finding that the defendant’s actions created a reasonable fear in the victim that dangerous consequences would result from a failure to obey the defendant and that the victim was otherwise induced to submit to the defendant.

We conclude that the prosecution presented sufficient evidence for a reasonable factfinder to conclude that defendant’s actions immediately preceding his sexual interaction with his older stepdaughter in June 1998 – while she and her young daughter were in a truck with defendant – considered in light of the past history of physical and sexual abuse between the former stepfather and stepdaughter, induced her to submit to fellatio. Defendant’s older stepdaughter testified that she initially told defendant she did not want to engage in fellatio with him and only acceded to his request after defendant put his arm around her neck and told her that she would do what he asked if she loved him. Her testimony regarding defendant’s past sexual and physical abuse further establishes that she was induced to engage in fellatio with defendant in June 1998. She had been sexually abused by defendant as a child. Although she had never been hit for failing to comply with defendant’s sexual demands, he had physically disciplined her for failing to obey him. Defendant’s older stepdaughter testified that she feared being hit by defendant if she failed to engage in fellatio with him in June 1998 and that she engaged in fellatio so that he would let her and her daughter out of his truck.

Although his older stepdaughter’s statement that defendant did not “push forcefully” on her neck raises a factual question regarding whether defendant forced her to perform fellatio by

putting his arm around her neck, and her admission that she did not remember the neck contact until two months before trial raises a question regarding the credibility of this testimony, these are factual questions properly within the province of the jury. Furthermore, although defendant contends that he was merely trying to persuade, and not force or coerce, his older stepdaughter to engage in fellatio, the *McGill* Court noted:

“Just where persuasion ends and force begins . . . is essentially a factual issue, to be resolved in light of the controlling legal precepts. That threats of force need not be made in any particular manner in order to put a person in fear of bodily harm is well established. Indeed, conduct, rather than words, may convey the threat.” [*McGill, supra* at 475, quoting *State v Rusk*, 289 Md 230, 246; 424 A2d 720 (1981) (internal citations omitted).]

This court finds that defendant’s act of putting his arm around his older stepdaughter’s head and neck, and her subsequent agreement, out of fear, to accede to defendant’s request, especially in light of defendant’s past abuse of her, constituted sufficient evidence for a reasonable juror to find that defendant forced or coerced her to engage in fellatio against her will.

Finally, defendant challenges the trial court’s decision to depart from the statutory minimum sentencing range when sentencing defendant to a minimum of eighty-four months’ imprisonment. However, we note that the trial court used incorrect scoring guidelines to determine defendant’s minimum sentence. Therefore, we must remand this case to the trial court for resentencing.

The trial court scored defendant’s conviction for third-degree CSC using the legislative sentencing guidelines. However, defendant was convicted for third-degree CSC based on an incident that occurred in June 1998. The statutory sentencing guidelines only apply to felonies committed on or after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Because defendant was convicted of third-degree CSC for a crime he committed in June 1998, the trial court should have sentenced him for this conviction under the judicial sentencing guidelines.

Although defendant was also convicted for crimes he committed after January 1, 1999, when a defendant has multiple concurrent convictions and is subject to concurrent sentences, the defendant’s sentence is based on the recommended minimum sentence range for his highest-class offense, and scoring of the defendant’s lesser offenses is unnecessary. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). Because defendant is subject to concurrent sentences, only the sentence for defendant’s most severe offense must be scored. *Id.*; see also *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997) (discussing the judicial sentencing guidelines).

The judicial and statutory guidelines each provide a methodology for determining the proper conviction to use for scoring purposes. The judicial guidelines state:

In instances when there are multiple convictions for a single offender, the judge must complete the SIR [sentencing information report] for the conviction that carries the highest statutory maximum. In instances in which the multiple convictions have the same statutory maximum, the judge may choose the

conviction offense upon which to score the offender. [Michigan Sentencing Guidelines Manual (2nd ed, 1998).]

Second-degree and third-degree CSC carry the same statutory maximum sentence of fifteen years. MCL 750.520c(2); MCL 750.520d(2). When sentencing a defendant for multiple concurrent convictions under the statutory guidelines, the recommended minimum sentence range for the crime having the highest crime class controls. *Mack, supra* at 127-128. Third-degree CSC is the highest crime class felony under the statutory sentencing guidelines; third-degree CSC is a class B felony, and second-degree CSC is a class C felony. MCL 777.16y. We conclude that the trial court should consider defendant's third-degree CSC conviction for scoring purposes because this conviction could be considered defendant's highest-class offense under *both* the judicial and statutory guidelines.

Because defendant's third-degree CSC conviction is his most severe, or highest-class, offense, and defendant's sentences for all his concurrent convictions should be based on the scoring of his most severe offense, defendant's sentences should be based on the trial court's scoring of defendant's third-degree CSC conviction. Because the incident for which defendant was convicted of third-degree CSC occurred before January 1, 1999, the trial court should apply the judicial sentencing guidelines to score this crime. Consequently, we remand this case for resentencing.

Defendant's convictions are affirmed, but this case is remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey